Supreme Court, U.S.
FILED

(1) No. 94-1167 NOV 17 1994

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term 1994

Kachina Plywood, Inc., Intermountain Wood Products, Inc., Robertson Wood Products, Inc., Zeco, Inc., Nevada-West Systems, Inc., Sunway Systems, Inc., Canco, Inc., Perco, Inc., and Andrew B. Spain,
Petitioners,

v.

Norma J. Hurt,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

George R. Carter, Esq.
(Admitted to Practice before the United States Supreme Court on October 17, 1994)
1013 East Garces Avenue
Las Vegas, Nevada 89101
(702) 384-8951

Counsel of Record for Petitioners

93

Questions Presented For Review

Whether a stipulated settlement agreement reached during the trial of an adversary proceeding in bankruptcy should be rescinded and set aside for the reasons that:

(a) the agreement contained at least one material ambiguity;

(b) the agreement had not been authorized by all of the parties;

(c) the agreement was reached based on misrepresentations by opposing counsel; and

(d) one Petitioner did not have any input into the agreement and was not present when the bankruptcy court approved it.

List of Parties

In addition to the named parties, Milton G. Pace filed a brief in proper person before the Court of Appeals for the Ninth Circuit, and argued his brief in proper person.

Per Rule 29.1, there are no parent or subsidiary companies to be listed for any of the corporate petitioners herein except that Kolb, Inc., a Nevada Corporation, is a holding company which owns the stock of Kachina Plywood, Inc.

Topical Index

Page

QUESTIONS PRESENTED FOR REVIEW.....i
LIST OF PARTIES.....ii
OPINIONS BELOW.....1
JURISDICTION.....3
STATUTES INVOLVED.....5
STATEMENTS OF THE CASE.....7
The Facts.....7
Original Federal Jurisdiction.....12
REASONS FOR GRANTING THE WRIT.....12
(a) The Agreement contained at least one material ambiguity.....13
(b) The Agreement had not been authorized by all of the parties.....16
(c) The Agreement was reached based on misrepresentations by opposing counsel.....19
(d) One Petitioner did not have input into the Agreement and was not present when the bankruptcy court approved it.....29
CONCLUSION.....30

Appendix

A. Order and Judgment of the United States Bankruptcy Court for the District of Arizona dated April 3, 1990

B. Memorandum of the Bankruptcy Appellate Panel of the Ninth Circuit dated June 1, 1992 affirming the Bankruptcy Court

C. Order of the Court of Appeals for the Ninth Circuit dated May 20, 1994 affirming the Bankruptcy Appellate Panel

D. Order of the Court of Appeals for the Ninth Circuit dated July 22, 1994 denying petition for rehearing and suggestion for rehearing *en banc*

E. Letters of Petitioners to their Trial Counsel dated February 8-9, 1990 informing counsel that no authority to settle had been given

F. Affidavit of T. Hull dated March 3, 1990

G. Affidavit of William C. Wulfers, Jr. dated June 18, 1990

H. Objection to Order and Judgment or, alternatively, Motion To Set Aside Order and Judgment If Entered, filed March 7, 1990

TABLE OF AUTHORITIES CITED

CASES PAGE

Alt v. Krueger 663 P.2d 1078(Ha.App 1983).....19
Berry v. Robotka 453 P.2d 972(Ariz 1969).....21
Blanton v. Woman Care, Inc. 696 P.2d 645(Cal [*en banc*] 1985).....19
Cross v. District Court 643 P.2d 39 (Colo [*en banc*] 1982).....19
Dillon, Read & Co., Inc. v. U.S. 875 F.2d 293 (Fed.Cir. 1989).....22
Hays v. Fischer 777 P.2d 222(Ari App 1989).....18
Hilburn v. General Electric Credit Corp 442 P.2d 547(Ariz 1968).....20
Hubbs v. Costello 528 P.2d 1257(Ariz 1974).....21
In Re Edward M. Johnson and Associates, Inc. 845 F.2d 1395(6th Cir 1988).....15
In Re Lenox 902 F.2d 737(9th Cir 1990).....22
In Re Neuman 55 B.R. 702 (S.D.N.Y. 1985).....20
*In Re Nicholson Industries, Inc.*73 B.R. 266(BK S.D.N.Y. 1985).....22
*In Re Royster Company*132 B.R. 684(BK S.D.N.Y. 1991).....20
Lehnhardt v. City of Phoenix 460 P.2d 637(Ariz 1969).....20
McCutchin v. SCA Services of Arizona, Inc. 709 P.2d 591(Ari App 1985).....15
Moyer v. Chiricahua Ranches 61 P.2d 163(Ariz 1936).....20
Renner v. Kehl 722 P.2d 262(Ariz 1986).....28
Sam Galloway Ford v. Universal Unerwriters, Inc. 793 F.Supp 1079(M.D.Fla 1992).....21
Spearman v. J & S Farmers, Inc. 755 F.Supp.137(D.S.C. 1990).....14
State v. Masselman 667 P.2d 1061(Utah 1983).....19

United Liquor Company v. Stephenson 322 P.2d 886(Ariz 1958).....18
United States v. ITT Continental Banking Company 420 U.S. 223, 95 S. Ct. 926, 43 L.Ed 2d 148(1975).....20
Washington Hopital v. White 889 F.2d 1294(3rd Cir 1989).....16
Wheeler v John Deere Co. 935 F.2d 1090(10th Cir 1991).....2

STATUTES PAGE

11 U.S.C. subsection 301.....3, 5, 12
28 U.S.C. subsection 1254(1).....5
11 U.S.C. subsection 105(a).....5, 6, 12, 22

RULES PAGE

Bankruptcy Rule 7001.....3, 12
Bankruptcy Rule 9024.....5, 6

In the
Supreme Court of the United States

October Term 1994

Kachina Plywood, Inc., Intermountain Wood Products, Inc., Robertson Wood Products, Inc., Zeco, Inc., Nevada-West Systems, Inc., Sunway Systems, Inc., Canco, Inc., Perco, Inc., and Andrew B. Spain,
Petitioners,

v.

Norma J. Hurt,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners herein respectfully pray that a Writ Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on May 20, 1994.

Opinions Below

The unanimous ORDER of the Court of Appeals for the

Ninth Circuit denying Petitioners' requests for rehearing and for rehearing *en banc* has not been reported, and was entered on July 22, 1994. That ORDER is reprinted in the Appendix.

The unanimous ORDER of the Court of Appeals for the Ninth Circuit affirming the Bankruptcy Appellate Panel's MEMORANDUM decision has not been reported, and was entered on May 20, 1994. All aspects of the Bankruptcy Appellate Panel's decision were affirmed, with the exception that all sanctions imposed below against Petitioners were reversed. That ORDER is reprinted in the Appendix.

The MEMORANDUM of the United States Bankruptcy Appellate Panel of the Ninth Circuit affirming the ORDER AND JUDGMENT of the United States Bankruptcy Court for the District of Arizona has not been reported, and was entered on June 1, 1992. That MEMORANDUM is reprinted in the Appendix.

The ORDER AND JUDGMENT of the United States Bankruptcy Court for the District of Arizona has not been

reported, and was entered on April 3, 1990. That ORDER AND JUDGMENT is reprinted in the Appendix.

Jurisdiction

The jurisdiction of the United States Bankruptcy Court for the District of Arizona was invoked pursuant to 11 U.S.C. subsection 301 and pursuant to Bankruptcy Rule 7001 et seq. by the filing of Adversary number 87-199 (consolidated) by the Debtor Norma J. Hurt under Case No. 85-3802-PHX-RGM on March 24, 1987. Several other adversary proceedings involving the same parties were consolidated under Adversary No. 87-199.

The Honorable Cameron Wolfe signed the ORDER AND JUDGMENT deciding the consolidated adversary proceeding, which order was entered on April 3, 1990. See Appendix.

Petitioners herein, together with Milton G. Pace, filed their NOTICE OF APPEAL from Judge Wolfe's decision on April 13, 1990. That appeal was heard and decided by the Bankruptcy Appellate Panel for the United States Court of Appeals for the

Ninth Circuit, where a three judge panel filed a MEMORANDUM decision on June 1, 1992. See Appendix.

Petitioners next appealed to the Court of Appeals for the Ninth Circuit by way of a NOTICE OF APPEAL filed August 23, 1992. The NOTICE OF APPEAL covered both the MEMORANDUM decision entered June 1, 1992, and the ORDER filed July 31, 1992 denying Petitioners' motions for rehearing. A unanimous three judge panel of the Ninth Circuit affirmed the judgment of the Bankruptcy Appellate Panel, with the exception that all sanctions against Petitioners which had been imposed were reversed. Sanctions against Milton G. ace, who appeared in proper person, were left intact. The ORDER of the Ninth Circuit panel entered May 20, 1994 gave no separate reasons for affirmance and was in reality only three sentences long. See Appendix.

A Petition for rehearing and a suggestion for rehearing *en banc* was filed by Petitioners on June 9, 1994, and the same were

denied by an ORDER entered on July 22, 1994. See Appendix.

Petitioners next filed in this Court a MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI on October 7, 1994, and an ORDER granting an extension to file until November 19, 1994 was signed on October 7, 1994 by Justice Sandra D. O'Conner.

The jurisdiction of this Court to review the decision of the Ninth Circuit in invoked under 28 U.S.C. subsection 1254(1). This petition is timely filed within the time allowed by the extension ORDER granted by Justice O'Conner.

Statutes Involved

11 U.S.C. subsection 301, 11 U.S.C. subsection 105(a), and Bankruptcy Rule 9024.

11 U.S.C. subsection 301 provides:

Subsection 301. Voluntary cases

> A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such

chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2558.

...

11 U.S.C. subsection 105(a) provides:

Subsection 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provision of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

...

Bankruptcy Rule 9024 provides:

Rule 9024

RELIEF FROM JUDGMENT OR ORDER

Rule 60 F.R.CivP. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in chapter 7 liquidation case may be filed only within the time allowed by subsection 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by subsection 1144, subsection 1230, or subsection 1330.

Amended Apr. 30, 1991, eff. Aug 1, 1991.

Statement of The Case

The Facts

The Debtor in the underlying bankruptcy case no. 85-3802-PHX-RGM, and Respondent at bar, Norma J. Hurt, was married to Milton G. Pace, one of the Appellants below, from 1952 until 1978, after which time their marriage was dissolved and their property was divided by the Superior Court of Maricopa County, Arizona.

At the time of dissolution, there were substantial debts owed to various creditors, including some of the Petitioners herein, by the couple's proprietorship, Truck City Lumber Company. Although a settlement was reached, which would have resulted in payment for the creditors, the Debtor breached the agreement and it came to naught.

As a result of that breach, Kachina Plywood, Inc., Robertson Wood Products, Inc., and Nevada-West Systems, Inc. filed an involuntary bankruptcy petition against Norma J. Hurt on

December 9, 1985, alleging nonpayment of debts owed form the proprietorship.

The petition was answered and consented to by the Debtor, and various adversary actions were commenced by creditors Robertson Wood Products, Inc., Kachina Plywood, Inc., Canco, Inc., Sunway System, Inc., Perco, Inc., and Intermountain Wood Products, Inc. The Debtor filed adversary action no. 87-199 naming Petitioners at bar as defendants (together with Milton G. Pace) on April 24, 1987. (Note: Petitioner Andrew B. Spain entered the case at a later time by way of objection to sale of real property)

All of the various adversary proceedings were consolidated under no. 87-199 on August 10, 1987, and further proceedings were conducted under that number.

On January 22, 1990 the trial of the consolidated adversary action began in the United States Bankruptcy Court in Phoenix, with Judge Cameron Wolfe presiding. The focus of the trial was

the competing claims of the Debtor and her creditors to a parcel of real property located in Phoenix.

After a full day of trial, the hearing was terminated by reason of a hastily arrived at settlement agreement purportedly agreed to by all parties.

During the course of the trial, Debtor's counsel stated that the Debtor had a valid judgment lien against Milton G. Pace in the amount of $19,000.00, plus twelve years of interest at ten percent, and that the lien was in place against the real property at issue. After the settlement agreement had been announced to the Court, Trial Counsel for Petitioner Sunway Systems, Inc. discovered that in fact no valid lien existed. An affidavit was prepared and submitted to the Trial Court by Mr. T. Hull, and the same is reprinted in the Appendix.

During the course of the settlement negotiations, which took place in the courtroom before the hearing was scheduled to continue on January 23, 1990, the Debtor represented that the real

property at issue had not more than $15,000.00 in taxes owing against it, which representation was relied upon in negotiating a settlement. After the settlement agreement had been announced to the Court, Trial Counsel for Petitioner Kachina Plywood, Inc., Robertson Wood Products, Inc., and Intermountain Wood Products, Inc. discovered that in fact approximately $60,000.00 in taxes were due and owing. An affidavit was prepared and submitted to the Trial Court by William C. Wulfers,Esq., and the same is reprinted in the Appendix.

During the same negotiations, the Debtor failed to disclose the existence of an ordnance violation against the real property at issue. See Affidavit of William C. Wulfers, Esq.

It also came to light after the announcement of the settlement agreement that Petitioners Nevada-West Systems, Inc., Canco, Inc., Kachina Plywood, Inc., Robertson Wood Products, Inc., Zeco, Inc., and Andrew B. Spain had not authorized their Trial Counsel to settle the case. The letters from the various Petitioners

protesting the unauthorized settlement were part of the Record on Appeal, and are reprinted in the Appendix.

As a result of the discovery by Petitioners of the true facts surrounding the settlement negotiations, they filed an OBJECTION TO ORDER AND JUDGMENT on February 14, 1990 before the Trial Court had entered a judgment. Petitioners requested a hearing on their objections. That pleading is reprinted in the Appendix. Milton G. Pace had already filed a NOTICE OF RESCISSION, REVOCATION AND CANCELLATION OF SETTLEMENT AGREEMENT on February 6, 1990 for the same reasons.

Without holding a hearing and making findings of fact concerning the allegations of misrepresentation and mistake of fact, Judge Wolfe signed the ORDER AND JUDGMENT approving the settlement agreement, and the same was entered on April 3, 1994. See Appendix.

It is noteworthy that the original settlement agreement called

for Debtor to "...deed her undivided one-half interest in the property...", whereas the ORDER AND JUDGMENT only required Debtor "...to execute a quit claim deed of her undivided one-half interest in the property..." Petitioners allege that a material ambiguity exists as a result of the change from the original agreement to the final order.

Original Federal Jurisdiction

This case is an appeal of an adversary action in a bankruptcy proceeding. Eleven U.S.C. subsection 301 permits filing of bankruptcy petitions, and Bankruptcy Rule 7001 *et seq.* governs adversary proceedings. Eleven U.S.C. subsection 105(a) empowers the bankruptcy courts to issue orders necessary or appropriate to carry out the provisions of Title 11. That authority specifically includes orders to prevent an abuse of process.

Reasons For Granting The Writ

The significant reasons why this Court should grant a Writ of Certiorari and decide this case are four in number:

(a) The Agreement contained at least one material ambiguity

The agreement arrived at by the parties, an as stated on the record in open court by her counsel Mr. Eagleburger, was as follows:

> "Norma Hurt agrees that she will deed her undivided one-half interest in the property at 500 E. Broadway upon occurrence of the following:" To Creditors Nominee
>
> Record On Appeal, Volume III, p. 416.

In the ORDER AND JUDGMENT signed by Judge Wolfe, which was also prepared by Debtor's Counsel, something quite remarkable occurs:

> 10. Norma J. Hurt is directed to execute a quit claim deed of her undivided one-half interest in the property located at 500 East Broadway and 630 East Broadway upon the occurrence of all the following:
>
> a. The claimants producing releases of all lien of themselves, their assignees or successors to the property of the debtor,
>
> b. Formal entry of this order of dismissal with prejudice of all the claimants' causes of action and claims in the bankruptcy,
>
> c. Payment of all unpaid child support owing by Milton Pace under the divorce decree in Maricopa County Superior Court Cause No. DR 66280,
>
> d. Certification from Lester Penterman that

satisfaction of his administrative fees upto $50,000.00 in this bankruptcy proceeding through the date of January 23, 1990 have been made, and

e. The furnishing of evidence that $5,000.00 has been deposited in the bankruptcy estate for purposes of paying in part or in whole the sales tax liability imposed upon the debtor by the Arizona Department Revenue. {emphasis added} See Appendix for full text of ORDER AND JUDGMENT.

Not only is the Debtor relieved of having to furnish a warranty deed, but the order does not say who the deed was to made favor of. Obviously, conveying by quit claim deed is quite different than conveying by a warranty deed, and not designating who the grantee is to be sets the stage for considerable confusion.

Petitioners cannot countenance the change from "deed" in the settlement agreement to "quitclaim deed" in the ORDER AND JUDGEMENT. The ORDER AND JUDGMENT then becomes subject to different interpretations, which call for remand to the Trial Court, if for no other reason than to clarify what the parties believed they were bargaining for. Spearman v. J & S Farmers, Inc., 755 F. Supp. 137 (D.S.C.1990).

Moreover, the failure of the Trial Court to determine to

whom the property is to be deeded cannot be answered within the context of the ORDER AND JUDGMENT.

Clearly, a deed must be made out to some actual person, and the failure to name that person is material ambiguity.

The law in Arizona is that an agreement is uncertain and ambiguous "if the language used by the parties can reasonably be construed in more than one sense and such construction cannot be determined within the four corners of the instrument. McCutchin v. SCA Services of Arizona, Inc., 709 P.2d 591 (Ari App.1985).

Inasmuch as an ambiguity exists, the Bankruptcy Judge should have accorded Petitioners a hearing to clear the issue up. That conclusion was reached by the Sixth Circuit in a similar situation involving a bankruptcy. In Re Edward M. Johnson and Associates, Inc., 845 F.2d 1395 (6th Cir.1988), at 1400.

Similarly, the Third Circuit has held that factual findings are necessary at the trial level to determine what the parties really intended to agree upon in the event an ambiguity is present:

However, the legal resolution of any particular ambiguity in the stipulation's construction is not possible in the absence of factual findings by the district court as what the parties intended the ambiguous provisions to mean. Hence, ambiguous provision is the stipulation must be interpreted by the factfinder, here the district court, as an initial matter. Appellate review of those facts, when found, will of course be for clear error. *See Fox v. United States Dep't of Hous. & Urban Dev.*, 680 F.2d 315, 319 (3d Cir.1982) (when controverted extrinsic evidence is required to interpret the meaning of am ambiguous provision, interpretation becomes a question of fact to be resolved by the factfinder).

> Washington Hospital v. White, 889 F.2d 1294 (3rd Circuit 1989), at 1300.

By reason of the material ambiguity concerning what type of deed was to be executed and to whom, the Trial Court should have held a hearing to ascertain the parties' true intentions, and then made factual findings. This was not done, and constitutes reversible error.

(b) The Agreement had not been authorized by all of the parties.

On the second day of the scheduled trial, before the court convened, counsel for the parties met and negotiated a settlement agreement, which became the basis for the ORDER AND JUDGMENT. For purposes of this settlement conference, Kachina

Plywood, Inc., Robertson Wood Products, Inc. were represented by William C. Wulfers, Jr., and Canco, Inc., Nevada-West Systems, Inc., and Zeco, Inc. were represented by William Paitt. Petitioner Andrew B. Spain was not represented by counsel and was not present.

As a result of these negotiations, counsel signed the settlement agreement and entered the purported agreement into the record at 1:30p.m. on January 23, 1990. Unfortunately, the above-mentioned counsel failed to obtain the consent of their clients prior to signing the settlement agreement! This fact was pointed out to the Court in Petitioners' ''Objection to Order an Judgment''. See Appendix.

That fact is substantiated by letters drafted by several of the Petitioners herein, namely Kachina Plywood, Inc., Robertson Wood Products, Inc., Nevada-West Systems, Inc., Canco, Inc., and Zeco, Inc. to their counsel John Hover in early February, 1990 prior to entry of the ORDER AND JUDGMENT. All of

these letters expressly state that Petitioners did not give authority to counsel to settle their claims for less than the full amount, and that they were not even consulted by counsel prior to the settlement agreement being signed and entered on the record. See Appendix.

It is a well-established rule of law in Arizona that the general authority arising out of his employment does not give an attorney the implied or inherent power to compromise or settle his client's cause of action for anything less than the full value claimed. United Liquor Company v. Stephenson, 322 P.2d 886 (Ariz. 1958).

This rule is supported by later cases, such as Hays v. Fischer, 777 P.2d 222 (Ari. App1989), where the Court stated:

> [3,4] An attorney is not his client's general agent and has no authority merely by virtue of retention in litigation to impair the client's substantial rights or the cause of action without the client's consent. *Garn v. Garn*, 155 Ari. 156, 745 P.2d 604 (App.1987).

Id at 227.

The same general rule prevails in neighboring jurisdictions. See State v. Masselman, 667 P.2d 1061 (Utah 1983), Alt v. Krueger, 663 P.2d 1078 (Ha. App.1983), Blanton v. Woman Care, Inc., 696 P.2d 645 (Cal [en banc] 1985), and Cross v. District Court, 643 P.2d 39 (Colo.[en banc]1982).

It is simply unconscionable to permit a bankruptcy court to enter an order approving a settlement agreement when the court knows that said agreement was entered into without authority, as was the case at bar. See OBJECTION TO ORDER AND JUDGMENT in Appendix.

In the instant case, Petitioners herein never authorized their counsel to settle their claims, and were therefore never bound by the settlement agreement. Therefore, in approving and adopting that agreement as a part of its order, with full knowledge that said agreement exceeded the authority of signing counsel, Judge Wolfe committed reversible error as a matter of law.

(c) The Agreement was reached based on misrepresentations by

opposing counsel

The settlement agreement at issue is in reality a stipulation entered into by the parties, including Petitioners. As such, the settlement agreement is in the nature of a contract, and is subject to the general principles of contract law. See generally United States v. ITT Continental Banking Company, 420 U.S. 223, 95 S.Ct. 926, 43 L.Ed 2d 148 (1975), In Re Royster Company, 132 B.R. 684 (Bk S.D. N.Y. 1991), and In Re Neuman, 55 B.R. 702 (S.D. N.Y. 1985).

It is also a well established tenet of Arizona law that a contract, the execution of which was obtained through fraud, deceit or misrepresentation, may be cancelled at any time. Mouer v. Chiricahua Ranches Co., 61 P.2d 163 (Ariz 1936), and Hilburn v. General Electric Credit Corp., 442 P.2d 547 (Ariz 1968).

It is not necessary that the misrepresentation be intentional to make the contract voidable. Even transactions based on innocent or negligent misrepresentations may be rescinded. Lehnhardt v.

City of Phoenix, 460 P.2d 637 (Ariz 1969), and Hubbs v. Costello, 528 P.2d 1257 (Ariz 1974). Further, the nine elements of actionable fraud need not be established to justify rescission. Berry v. Robotka, 453 P.2d 972 (Ariz 1969).

In addition to the application of contract principles, there is a federal policy that erroneous stipulations should be set aside in the interest of justice. This policy was well-stated by the Court in Sam Galloway Ford v. Universal Underwriters Ins., 793 F. Supp. 1079 (M.D. Fla 1992):

> [5] Courts should generally encourage stipulations since doing so promotes judicial economy by avoiding litigation of agreed upon facts. One way for courts to encourage parties to stipulate is for courts to readily set aside stipulations when parties discover that the stipulations are erroneous. This willingness on the part of courts to set aside stipulations encourages parties to stipulate since the parties feel more confident that court will set aside the stipulations if there is a reasonable basis to do so. Such a reasonable basis arises when a party discovers that the stipulations are erroneous, or when the parties find new evidence that trends to contradict

> the stipulated facts. This Court recognizes the importance of being willing to set aside stipulations in order to encourage parties to stipulate.
>
> Id. at 1082.

The policy is best served if a set aside is done where there is no meeting of the minds. In Re Nicholson Industries, Inc., 73 B.R. 266 (Bk N.D. Ohio 1987). A trial court has a duty to reject a stipulation that is demonstrably false. Dillon, Read & Co., Inc. v. U.S., 875 F.2d 293 (Fed. Cir. 1989). Trial Courts are vested with broad discretion to set aside stipulations in the interest of justice. Wheeler v. John Deere Co., 935 F.2d 1090 (10th Cir. 1991). In accord is In Re Lenox, 902 F.2d 737 (9th Cir. 1990), holding that 11 U.S.C. subsection 105(a) gives Bankruptcy Courts the power to set aside stipulations in the interest of justice.

In the case at bar, the settlement agreement was procured directly through material misrepresentations, and was therefore voidable by Petitioners.

First Misrepresentation

First, it was represented by Debtor's counsel, to the Trial Court and to the other parties, that the Debtor had a valid judgment lien against Milton Pace:

> "MR. EAGLEBURGER: Part of that judgment was a judgment for $19,000.00 in attorneys' fees in favor of Mrs. Hurt and against Mr. Pace"
>
> "THE COURT: So you have two judgment claim to secure that $19,000.00?
>
> MR. EAGLEBURGER: And when Mr. Pace transferred it to Mr. Varbel, his own lawyer, on May 24, of 1978, mr. Varbel did in fact get title to the property but had -- but had a judgment lien on it for $19,000.00, which judgment has not been paid to date and interest runs on that judgment at 10 percent per annum since May 15 of 1978.
>
> THE COURT: How long does the judgment stay in effect?
>
> MR. EAGLEBURGER: Yes, your honor.
>
> THE COURT: Doesn't it need to be renewed periodically or what's the --
>
> MR. EAGLEBURGER: Pardon me, your Honor?

THE COURT: I say, the judgment is now

MR. EAGLEBURGER: Judgment in this case was renewed.

THE COURT: It was renewed?

MR. EAGLEBURGER: Yes."

Record on Appeal, Volume II, pp 243-4.

Thus, it was represented to all of the parties in open court that the Debtor held a valid judgment lien in the amount of $19,000.00, plus twelve years of interest at ten percent (10%), on the parcel of real property at issue in the case. In point of fact, that lien had expired in 1988, due to the failure of Debtor's counsel to renew it. See Affidavits of T. Hull and William C. Wulfers in Appendix.

That this misrepresentation was material can hardly be doubted. That lien, had it existed, would have constituted an encumbrance on the property in the amount of approximately $59,630.00 (i.e., 10% interest compounded annually for twelve years).

It is also obvious that the parties were justified in relying on the misrepresentation, since it was made in open court by the very individual who was responsible for seeing that the judgment lien had been renewed.

Second Misrepresentation

The second misrepresentation was an express statement by the Debtor during the settlement negotiations that the property at issue, located at 500 E. Broadway in Phoenix, had taxes owing in amount no greater than $15,000.00:

> "5. During those negotiations Mr. Eagleburger and specifically this client Norma J. Hurt formally known as Norma J. Pace were asked approximately how much was owed in taxes on the 500 E. Broadway property; and
>
> 6. That during those negotiations Mrs. Pace specifically stated that there was no more than $15,000.00 owed in property taxes on the 500 E. Broadway property,"
>
> See Affidavit of William C. Wulfers in Appendix.

Once again, this representation proved to be false. In point of actual fact, the Redemption Statements issued by Maricopa

County revealed a total tax liability through March 31, 1990, of $57.456.14. Record on Appeal, volume III, pp. 443-6

As in the previous instance, this misrepresentation was highly relevant, since one of the key terms of the settlement agreement was that the Debtor would deed over her interest in the property. And, as in the previous instance, the parties were justified in relying on the misrepresentation, since it was made by the individual purporting to hold title to the property. Further, the negotiations during which the misrepresentation wa made occurred at the court just prior to the settlement agreement being read into the record on January 23, 1990. Under such circumstances, it was not possible for the parties to investigate the truth of the Debtor's representations.

Failure to Disclose

In addition to the foregoing affirmative misrepresentations, during the settlement negotiations, the Debtor failed to divulge the existence of an ordinance violation of the property at issue:

> "That during the settlement negotiations, there was a total failure to disclose that Mrs. Hurt was in receipt of and/or had any information or knowledge in regards to an ordinance violation regarding the title to the 500 E. Broadway property;
>
> See Affidavit of William c. Wulfers in Appendix.

In fact, the parties later discovered that a Notice of Ordinance Violation had been issued on the property in December of 1989, and had been served on the Debtor.

Once again, under the circumstances described herein, and with other questions having been asked regarding the status of the title and any encumbrances, the Debtor was under a duty to divulge the existence of the Ordinance Violation. She did not do so. The net result of all of the above was a stipulation based upon incorrect assertions of fact, which were discovered to be false and promptly brought to the attention of Judge Wolfe.

To the extent that the foregoing misrepresentations were actually innocent misrepresentations, and not actual fraud to induce the parties to execute the settlement agreement, the agreement is

still voidable, due to the existence of mutual mistake. Petitioners herein certainly believed that the Debtor had a valid lien on the property, and that the back taxes on the property were not in excess of $15,000.00. If the Debtor believed so as well, then there exists a mutual mistake of fact.

It is well established in Arizona that mutual mistake of a material fact which constitutes an essential part of contract is a valid basis for rescission. Renner v. Kehl, 722 P.2d 262 (Ariz 1986).

Therefore, whether based upon application of contract law principles, or upon the policy of the federal courts to set aside stipulations based upon the fraud, misrepresentation, or mutual mistake of fact, the Bankruptcy Court should have set aside the settlement agreement at bar.

The Trial Court's failure to do so, and the Bankruptcy Appellate Panel's attempt to gloss over the problem with the settlement "The Court had a valid agreement before it"

(MEMORANDUM p.11) simply does not comport with justice. If misrepresentation and dishonesty are permitted and rewarded in the federal courts, as was done below in the case at bar, it is small wonder that a large segment of the American people have no confidence in the system.

The Bankruptcy Court committed reversible error by continuing to rely upon a stipulation whose basis had been exposed as false.

(d) One Petitioner did not have any input into the agreement and was not present when the bankruptcy court approved it.

The letter of Petitioner Andrew B. Spain reprinted in the Appendix is quite clear that Mr. Spain was neither accorded an opportunity to be heard regarding the settlement, nor did he give anyone authority to settle his claim.

Mr. Spain was denied basic due process, and the Bankruptcy Court committed reversible error by accepting the settlement agreement without Mr. Spain's approval.

Conclusion

For the reasons cited herein, this petition for writ of certiorari should be granted. The policy of encouraging parties to stipulate can only be advanced and fostered in a climate where litigants know the courts will set aside stipulations based upon fraud, misrepresentation, or mutual mistake of fact. The same is true of stipulations settling cases made by counsel without permission of the clients.

This Court has the opportunity to make a significant decision on how stipulations are to be treated, and when they may be set aside, especially in a bankruptcy proceeding. That opportunity should be seized and utilized in the interest of justice.

George R. Carter, Esq.
(Admitted to Practice before the
United States Supreme Court on
October 17, 1994)
1013 East Garces Avneue
Las Vegas, Nevada 89101
(702) 384-8951
Counsel of Record
for Petitioners

Appendix A

Order and Judgment of the United States Bankruptcy Court For The District of Arizona dated April 3, 1990

G. Gregory Eagleburger
EAGLEBURGER & KELLER
A Professional Corporation
ATTORNEYS
340 E. Palm Lane, Suite 200
Phoenix, AZ 85004
(602) 258-2733

FILED
April 3, 1990
Kevin E.
O'Brien, Clerk
United States
Bankruptcy
Court

JUDGMENT RECORDED IN THE
OFFICE OF THE CLERK,
U.S. BANKRUPTCY COURT
JD-90-52 DATE: 4/ /90

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: NORMA J. HURT, Debtor.	CASE NO. 85-3802-PHX-RGM ADVERSARY NO. 87-199 (Consolidated)
NORMA J. HURT, fka NORMA J. PACE, Plaintiff, vs. KACHINA PLYWOOD, INC. et al., Defendants/ Claimants.	ORDER AND JUDGMENT (Quieting Title to Real and Personal Property, Dismissing Creditors' Claims and Approving Settlement)

This matter having come on regularly for trial before the Honorable Cameron Wolfe, visiting Bankruptcy Judge, on the 22nd day of

January, 1990, all parties having announced ready and the trial begun.

The presentation of evidence on the claim of Sunway Systems, Inc. having been made and the claim of Sunway Systems, Inc. having been taken under advisement but has not been ruled upon at the time of the settlement entered into noted hereafter. The court finds the settlement is binding upon Sunway Systems, Inc. because it is found that Sunway Systems, Inc. was fully advised of any alleged defense at or before the time of the acceptance by the court of the settlement and waived such by signature of its authorized agent to the settlement.

The claim of Perco, Inc. and Debtor's defense thereto having next been presented to the Court, such claim is denied by the Court on the grounds and for the reasons that the Court finds (1) totally inaccurate and uncredible the testimony of Mr. Milton Pace, the primary witness of Perco, Inc.; (2) the

recording of the various assignments and deeds upon which Perco's claim is based were not done for consideration but were created solely to prevent Mrs. Hurt from the enjoyment of her property and were recorded well after the divorce decree further evidencing their inapplicability to the property and the non-community nature of the debt both of which facts are hereby specifically and individually found; (3) the transfers of full interest to Mrs. Hurt by Glen and Maud Pace in 1979 is inconsistent with Perco's claim of an earlier unrecorded assignment of the interests of Glen and Maud Pace; (4) the Dehbtor Mrs. Hurt took title to the property without notice or knowledge of the purported unrecorded transfers and thus has superior title to the property.

Additionally, the Court finds that the equitable doctrines of laches and unclean hands on the part of its assignor apply as to Perco's claims.

The remaining claims other than Mr. Pace's and the Spains' claim were presented and evidence taken that tended to show by the claimants own financial records that the debts sought to be enforced could not have existed and the trial court so indicated to all parties.

The remaining parties in the adversarial litigation including Sunwest Systems, Inc. thereafter advised the Court of a stipulation resolving all remaining undecided adversarial proceedings including those of Sunway Systems, Inc., Kachina Plywood, Inc., Robertson Wood Products, Inc., Intermountain Wood Products, Canco, Inc., Nevada-West Systems, Inc., Zeco, Inc., Milton G. Pace and Andrew B. Spain. Such stipulation was read on the record, in open court, discussed with all parties and finally approved as modified by Pace individually and by all other parties through their counsel who acknowledged that they had authority to execute such. A formal

settlement agreement, Exhibit B attached hereto, was executed by the parties with interlineations and a exhibit listing properties of the bankrupt involved in the settlement agreement, paragraph 2, and presented to the court. The settlement agreement submitted is approved, adopted by the Court and made a part of this judgment by reference.

Based upon such findings, decisions and settlements,

IT IS ORDERED, ADJUDGED AND DECREED:

1. The claims of the Defendants Sunway Systems, Inc., Kachina Plywood, Inc., Robertson Wood Products, Inc., Intermountain Wood Products, Canco, Inc., Nevada-West Systems, Inc., Zeco, Inc., Milton G. Pace and Andrew B. Spain are hereby denied and dismissed with prejudice, each party to bear their own costs and fees.

2. The proceeds from the American Savings Life Insurance Stock is found to be

the property of Norma J. Hurt and the funds are to be paid forthwith to her estate, and Defendants are directed to forthwith deliver to Norma J. Hurt the American Savings Life Insurance Stock Certificate.

3. The property listed on the exhibit tendered with the settlement agreement which have not been crossed out and initialed as "out" shall be confirmed in Norma J. Hurt as her sole and separate property and the claimants in this adversary proceeding and any related or affiliated person or entity shall forthwith remove any lien or lien claim upon such property. The effected property is described on Exhibit "A" attached and by reference made a part hereof.

4. Claimants Sunway Systems, Inc., Kachina Plywood, Inc., Robertson Wood Products, Inc. Intermountain Wood Products, Canco, Inc., Nevada-West Systems, Inc. Zeco, Inc., Milton G. Pace and Andrew B. Spain shall be responsible for up to $50,000.00 of the

fees of Lester Penterman in the administration of the bankruptcy estate for time and expenses incurred through January 23, 1990 and shall either pay or compromise such bills forthwith or seek a hearing on the adequacy and reasonableness of such fees. Any and all such costs, expenses and fees incurred by Plaintiff/Debtor in relation to any hearing or objection required to resolve the fee issue shall be borne by Claimants.

5. Claimants shall forthwith pay the sum of $5,000 into the bankrupt estate as and for partial payment of the Arizona Department of Revenue's sales tax claim.

6. Claimant Milton G. Pace shall pay forthwith all past due or unpaid child support including any penalties and interest accruing on such to Norma J. Hurt individually.

7. Claimants' liens and encumbrances, if any, placed upon the real properties of the debtor listed herein are declared to be null and void and claimants are ordered to supply

full and final releases of all liens and encumbrances placed upon the real properties of the debtor to the debtor forthwith. The Defendant/Claimants are hereby further ordered and directed to dismiss with prejudice any suit or action pending or filed in any jurisdiction against the plaintiff Norma J. Hurt and/or the real and personal property set forth herein and awarded to her as her sole and separate property in the 1978 divorce Decree/Order.

8. Claimants hereby waive and release any liens and encumbrances placed upon the real properties of Robert Hurt, present husband of debtor and debtor's family, and cause any assignee or successor in interest to such claim of lien or encumbrances to do the same forthwith.

9. Claimants have certified on the record to the Court that they have not assigned any claims they might have had or claimed to have had in the past against Truck

City Lumber Company or Mrs. Norma J. Hurt or Mr. Milton Pace to any other person or entity and that they know of no other claims by any entity concerning such claims. This certification to the court is deemed to be a representation by the claimants through their attorneys upon which the court and debtor is relying or had relied in reaching the settlement agreement.

Defendants are hereby enjoined from bringing any action or filing, or causing to be filed any lien or claim against the property of Plaintiff Norma J. Hurt and shall not assign any claim or purported claims against Norma J. Hurt or her property to any third party.

10. Norma J. Hurt is directed to execute a quit claim deed of her undivided one-half interest in the property located at 500 East Broadway and 630 East Broadway upon the occurrence of all the following:

a. The claimants producing releases of all lien of themselves, their assignees or successors to the property of the debtor,

b. Formal entry of this order of dismissal with prejudice of all the claimants' causes of action and claims in the bankruptcy,

c. Payment of all unpaid child support owing by Milton Pace under the divorce decree in Maricopa County Superior Court Cause No. DR 66280,

d. Certification from Lester Penterman that satisfaction of his administrative fees up to $50,000.00 in this bankruptcy proceeding through the date of January 23, 1990 have been made, and

e. The furnishing of evidence that $5,000 has been deposited in the bankruptcy estate for purposes of paying in part or in whole the sales tax liability imposed upon the debtor by the Arizona Department Revenue.

11. The debtor is directed to immediately notice all interested persons of her intent to pay all remaining creditors out of the proceeds of the estate and to conclude all sales presently pending in the bankruptcy and to thereafter immediately apply to the court for a dismissal of the involuntary bankruptcy filed herein.

12. Norma J. Hurt and Milton G. Pace shall forthwith enter into a mutual release and hold harmless agreement for all claims to be asserted by Norma J. Hurt against Milton G. Pace in a form to be approved by the attorneys for each party.

13. Upon the payment of the child support owing by Milton Pace under the divorce decree DR 66280 Norma Hurt shall execute and deliver a satisfaction of judgment as to such child support and deliver the same to Milton Pace or his attorney.

14. Debtor, Norma Hurt shall release any claims she has to American Savings Life

Insurance Stock claimed by Kachina, this stock being different from the stock proceeds referred to in item 2 of this order.

15. These orders are made based upon the in-court stipulations between the parties and representations made before the court in open court on the record and the executed settlement agreement.

Presented and signed

DONE IN OPEN COURT this 3rd day of April, 1990.

/s/ Cameron W. Wolfe
Honorable Cameron Wolfe
U.S. Bankruptcy Judge

Copy of the foregoing
mailed this 2nd day of
April, 1990, to:

J. Jeff Richardson, Esq.
4025 S. McClintock
Suite 202
Tempe, AZ 85282

William C. Wulfers, Jr., Esq.
VOGEL, WULFERS, CRAWFORD &
HALLADAY
6902 E. First Street
Suite 200
Scottsdale, AZ 85251

William M. Piatt, IV, Esq.
PIATT & LIVONI, P.C.
2700 North Central
Suite 1150
Phoenix, AZ 85004

Eric Jackson, Esq.
JACKSON & WHITE
1839 S. Alma School, Ste. 354
Mesa, AZ 85201

Andrew B. Spain
c/o P.O. Box 1330
Las Vegas, Nevada 89125

Milton G. Pace
P.O. Box 20786
Phoenix, AZ 85036

Lester L. Penterman, Esq.
6040 East Thomas Road
Scottsdale, AZ 85251

John C. Hover, Esq.
HOVER & SLOMSKI
7250 N. 16th Street, Suite 306
Phoenix, AZ 85020

/s/ Betty Beckwith

Exhibit A

Parcel No.	Location	County
101-17-195	11022 W. Apache	Maricopa
122-56-103	2441 E. Atlanta	Maricopa
105-56-004	744 W. Broadway	Maricopa
113-48-001A	820 E. Chipman	Maricopa
105-34-045	938 W. Cocopah	Maricopa
122-16-024	3031 E. Jones	Maricopa
301-91-192	1034 E. Julie	Maricopa
211-70-001H	New River & 7th Street	Maricopa
125-04-042	5313 E. Polk	Maricopa
112-13-006	1801 W. Tonto	Maricopa
112-13-005	1805 W. Tonto	Maricopa
112-13-098	1810 W. Tonto	Maricopa
	1814 W. Tonto	Maricopa
	420 E. Broadway	Maricopa
112-13-097	814 W. Broadway	Maricopa
208-14-286	16007 N. 25th Dr.	Maricopa
112-56-132	Lot 132 Broadway Estates	Maricopa
	1520 E. Wood	Maricopa
112-56-115	2442 E. Wier	Maricopa

113-33-027	4435 & 4433 S. 2nd Street	Maricopa
300-38-032	8428 S. 7th Pl.	Maricopa
11-29-037	821 N. 9th Ave.	Maricopa
113-27-010	4027 S. 15th St.	Maricopa
113-27-012	4035 S. 15th St.	Maricopa
105-20-030	1806 S. 28th Dr.	Maricopa
112-56-092	2470 E. Tamarisk	Maricopa
324-02-637	Kingman-Mohave County, Lot 12, Blk. 17, New Kingman, Add. #4	Mohave
324-02-784	Kingman--Mohave County, Lot 19, Blk. 23, New Kingman, Add. #4	Mohave
324-02-822	Kingman-Mohave County, Lot 58 & 59	Mohave
311-14-062	Kingman-Mohave County, Lot 1-4 Blk. 160, Golden Gate, Add. #8	Mohave
	Lot 6, 7 & 10 New Kingman, Add #3 Mohave County	Mohave
103-04-039	Apache Junction-Pinal County, 2.5 Acres	Pinal

Tract 28, Lot 5-10, Blk. 38	Creeds Colorado
Tract 31, Lot 1-8, Blk. 39	Creeds Colorado
Tract 36, Lot 7, Blk. 46	Creeds Colorado
Tract 32, Lot 1-6, Blk. 42	Creeds Colorado
Track 37, Lot 23, Blk. 46	Creeds Colorado

[This document had listed as page numbers 000460 through 000470.]

Appendix B

Memorandum of the Bankruptcy Appellate Panel of the Ninth Circuit dated June 1, 1992 Affirming the Bankruptcy Court

NOT FOR PUBLICATION

Filed Jun 1 1992
Nancy R. Dickerson, Clerk
U.S. Bkcy.App.Panel
of the Ninth Circuit

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	
NORMA J. HURT,	BAP No. AZ-90-1142/ AZ-90-1174 RJMe (Consolidated)
Debtor.	
	BK No. B 85-3802-PHX-RGM
	Adv. No. 87-199
MILTON G. PACE, et al.,	
Appellants,	
vs.	MEMORANDUM
NORMA J. HURT,	
Appellee.	

Argued and Submitted on March 19, 1992
at
Phoenix, Arizona

Filed - JUN 1 1992

Appeal from the United States Bankruptcy
Court for the
District of Arizona

Honorable Cameron Wolfe, Bankruptcy Judge, Presiding

Before: RUSSELL, JONES, AND MEYERS, Bankruptcy Judges.

I. FACTS

Norma J. Hurt ("Debtor") and Milton G. Pace ("Pace") were married until 1978, at which time their marriage was dissolved and their property was divided by state court order. At the time of the dissolution there were debts owed to various creditors as a result of the couple's proprietorship, Truck City Lumber Company. These business debts were never paid out of the couple's community assets.

In 1985, Kachina Plywood, Robertson Wood Products, and Nevada-West Systems, filed an involuntary Chapter 11[1] petition against the

---

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9035.

Debtor for alleged nonpayment of debts from Truck City Lumber Company. The Debtor consented to the involuntary bankruptcy petition in 1986. Two years after the involuntary bankruptcy petition was filed, an adversary proceeding was filed by the Debtor to adjudicate the claims of the various creditors. The claimant entities involved included Kachina Plywood Inc., Robertson Wood Products, Inc., Intermountain Wood Products, Inc., Nevada-West Systems, Inc., Sunway Systems, Inc., Andrew B. Spain, Zeco, Inc., Canco, Inc., and Perco, Inc. et al. (Collectively referred to as "Kachina, et al." except for "Perco" who has filed a separate brief.)

On January 22, 1990, a hearing was held by the bankruptcy court to determine the merits of the various claims asserted by the creditors against the Debtor's estate. One of these claims involved a dispute between the Debtor and Perco surrounding title to a one-

half undivided interest in property known as 500 E. Broadway. The property had initially been transferred to the Debtor, but was also conveyed to a series of other entities, finally ending with Perco. The court resolved the question of title in favor of the Debtor. The court stated that the testimony of Perco's primary witness, Pace, was "totally inaccurate and incredible" and that the transfers "were not done for consideration but solely to prevent the Debtor from the enjoyment of her property . . ."

On January 23, 1992, the remaining matters were resolved by a stipulated agreement between the Debtor and Pace, Kachina, et al., and Perco which concluded the adversary proceeding. This settlement agreement required the Debtor to execute a quitclaim deed of her undivided one-half interest in the 500 E. Broadway property to Perco, upon the occurrence of several conditions to be performed by Pace and the

other entities involved. One of the express conditions was that the payment of all unpaid child support owed by Pace would be paid to the Debtor.

The agreement was voluntarily entered into and there were no objections. The agreement was read into the record in open court. Moreover, the court questioned the parties at the hearing to confirm their understanding of the agreement. The stipulation was signed by all parties listed through their attorneys of record, while Milton Pace and Andrew Spain signed on their own behalf.

Two weeks later, Pace filed a "Notice of Recision, Revocation & Cancellation." In addition, Kachina Plywood filed an objection to the entering of an Order and Judgment confirming the court's approval of the settlement agreement and alternatively, a motion to set aside the entry of the Order and Judgment. Those motions were denied.

Three notices of appeal were filed. One was dismissed. The two remaining were consolidated into this appeal.

II. ISSUES

1. Whether the bankruptcy court erred in declining to vacate the stipulated settlement agreement.

2. Whether the bankruptcy court erred in ruling against Perco's interest in the subject property for insufficient evidence and whether certain testimony was properly excluded.

III. STANDARD OF REVIEW

We review the bankruptcy court's factual findings under the clearly erroneous standard, while conclusions of law are reviewed de novo. In re Holm, 931 F.2d 620, 622 (9th Cir. 1991); In re Acequia, 787 F.2d 1352, 1357 (9th Cir. 1966). Federal Rules of Bankruptcy Procedure 8013.

IV. DISCUSSION

A. Proper Parties on Appeal

Three notices of appeal were filed in this consolidated appeal. The original notice of appeal (AZ-90-1387) was filed by L & L Sales Co., R & L Development Corp., Andrew B. Spain, Nevada-West Systems, and Kachina Plywood. A "Notice of Errata" was filed on May 30, 1990 to add Robertson Wood Products, Canco and Zeco to this appeal. This appeal was dismissed for failure to prosecute on July 8, 1991.

The Debtor filed a motion with the Bankruptcy Appellate Panel to strike an appellant's brief that was submitted in this appeal by Kachina Plywood, Robertson Wood Products, Zeco, Canco, Nevada-West Systems and Andrew B. Spain. The Panel, by Judge Volinn, denied the motion to strike, but noted that the notice of appeal lists Kachina, et al. as appellees rather than appellants. The Panel, sua sponte ordered that Kachina, et al. were to be considered appellants for the purposes of briefing and appeal.

Perco, Inc. filed a notice of appeal on February 1, 1990 (AZ-90-1142) and Milton G. Pace filed a notice of appeal on February 12, 1990 (AZ-90-1174). Technically, only these two parties have filed valid notices of appeal.

Since the first notice of appeal (AZ-90-1387) was dismissed, it is unclear how the above-named entities (Kachina, et al., other than Pace and Perco) have standing. Even assuming so, the parties who filed the appeal, L & L Sales Co. and R & L Development have not filed a proof of claim in this case. They have not filed a brief and are not designated as appellants in this case. Their interest in this appeal, whatever it may have been, no longer exists. Most problematic is that Kachina and the above named entities have appended their interests onto the dismissed L & L Sales/R & L Development appeal by means of a "Notice of Errata." The Bankruptcy Code and The Federal Rules of Bankruptcy Procedure

do not provide for a "Notice of Errata" or any other such procedure to subsequently amend another party's notice of appeal in order to add themselves.

Although this Panel may have, as a preliminary matter, allowed Kachina, et al. to state their position by not summarily striking their brief, they are not absolved from the burden of showing that they are proper parties to this appeal. From the papers before this Panel it is unclear how these parties have standing.

B. The Merits

On the merits, Pace, Kachina, et al. argue that the settlement agreement should be vacated because of, inter alia, misrepresentation concerning the property, the attorneys lacked authority to enter the agreement, there was no consideration, the agreement is void for vagueness, the unilateral notice of recision had taken effect and the title of the order was incorrect. Additionally, Pace

argued that the bankruptcy court has no subject matter jurisdiction to approve the portion of the agreement dealing with child support payments. Perco argues in its brief that certain testimony was erroneously excluded on the ground of relevance, and that the court erred in concluding it had no interest in the subject property.

1. Misrepresentation

Pace and Kachina, et al. contend that they are not bound by the voluntary settlement agreement entered into with the Debtor because their approval was procured through fraudulent representations allegedly made by the debtor. Pace and Kachina, et al. base their contentions on the following: 1) that the Debtor stated that a judgment lien against Milton Pace was renewed when actually it lapsed in 1988; 2) that the Debtor failed to reveal that the property in question, 500 E. Broadway, was in violation of certain ordinances; and, 3) that the taxes owed on the

property are allegedly $57,000, not $15,000 as the Debtor had stated.

Pace and Kachina, et al. assert that because of thews alleged misrepresentations, the entire stipulated agreement is not enforceable. We disagree. From the briefs and record on appeal it is unclear why these alleged misrepresentations, all of which relate to the 500 E. Broadway property, would affect Pace and Kachina, et al. when none of these parties claim an interest in that property. It is only Perco, who unsuccessfully litigated its interest in this property, and who now appears to be the intended transferee pursuant to the stipulated agreement, who has any interest in this property. Strangely enough, Perco's brief does not argue these misrepresentations on appeal.

None of the obligations or benefits of Pace or Kachina are affected by the facts allegedly misrepresented. Under the

settlement agreement Pace and Kachina were to pay the Debtor's $50,000 attorney fees which accrued from the administration of her bankruptcy estate, pay $5,000 into the bankruptcy estate as partial payment for the Arizona Department of Revenue's sales tax claim, and produce releases of all liens that the claimants have against the Debtor's properties. In addition, Pace voluntarily agreed to pay all back child support owed from the divorce decree.

The alleged misrepresentations made by the Debtor only affect the transfer of the property known as 500 E. Broadway, which was being conveyed to Perco in the settlement agreement. Neither Pace nor Kachina, et al. assert in their appellate briefs any basis for which they could have reasonably relied upon the alleged misrepresentations in entering the settlement agreement. We fail to see any connection between the alleged misrepresentations made by the Debtor, and the

duties of Pace and Kachina, et al. under the settlement agreement. We therefore need not reach the issues of whether the misrepresentations were material and went to the basis of the agreement or whether the parties had constructive or other notice of the facts alleged[2].

2. Attorney Authority

Kachina et al. assert that the settlement agreement was void ab initio because their attorneys of record, William C. Wulfers, Jr. and William Piatt, "were not authorized to settle their claims for anything less than the full amount of the claims." Further, that by adopting the settlement agreement in the Order and Judgment, Kachina contends that the bankruptcy court coerced them into a settlement which they never authorized,

---

[2] Nonetheless, on review of what exists in the record it appears that the appellants' evidence concerning the claim for misrepresentation is weak on the merits.

thereby committing reversible error. We disagree.

William C. Wulfers, Jr. was the attorney of record for Kachina Plywood and Robertson Wood Products. William Piatt was the attorney of record for Canco, Nevada-West Systems, and Zeco. No limitations on their authority were communicated to any of the parties.

It is a well known fundamental tenet of agency law that an agent with apparent authority can bind his principal relative to third parties who reasonably relied on that authority. Restatement (Second) of Agency § 8 (1958). Attorneys of record have such authority. "[L]itigants are bound by the conduct of their attorneys, absent egregious circumstances which are not present here." Wei v. State of Hawaii, 763 F.2d 370, 372 (9th Cir. 1985) (quoting Kung v. FOM Investment Corp., 563 F.2d 1316, 1318 (9th Cir. 1977) and Anderson v. Air West, Inc., 542 F.2d 522, 526 (9th Cir. 1976)).

"The act of an attorney of record on behalf of a party is binding on that party." Matter of Bradford, 5 B.R. 18, 20 (Bankr. D. Nev. 1980) (Bankruptcy court rejected debtor's argument that a stipulation entered into by their attorney was invalid because it was not authorized.)

It is not unreasonable for a third party to assume that trial counsel has the authority to enter into a binding settlement agreement with respect to the same matter that the parties had litigated. We find that the attorneys of record, William C. Wulfers, Jr. and William Piatt had the ability to bind the claimants during the adversary proceeding and for the purposes of the settlement agreement as their actions were within the scope of their apparent authority.

3. Agreement to Pay All Past Due Child Support.

Pace argues that the clause in the settlement agreement stating that he shall pay

all back child support to the Debtor was not "related" to the bankruptcy and therefore not within the subject matter jurisdiction of the bankruptcy court. Arguing that child support payments are, according to Arizona law, a right that vests only with the child which has no effect whatsoever on the debtor's estate, he reasons that the bankruptcy court is without power to issue an order approving the settlement agreement as to child support.

We disagree. The settlement agreement entered into between the Debtor and the claimants was designed to finally resolve all claims asserted by the claimants against the Debtor's estate. The parties agreed to stipulate to collateral matters, such as the payment of child support, as part of this settlement agreement. Pace's agreement to pay the past owed child support was simply one of several express conditions precedent to the Debtor's obligation to deed over her interest to the 500 E. Broadway property to Perco and

to bring the adversary proceeding to a close. The adversary proceeding and the claims brought against the Debtor's estate are what directly affects the estate such that the settlement agreement need be approved by the bankruptcy court. Simply because one of these conditions does not arise under bankruptcy law does not remove the court's jurisdiction to approve the agreement with respect to that condition.

Here, the bankruptcy court is not asked to adjudicate, interpret or enforce a child support decree or decide any other family law issues. The bankruptcy court's only involvement is to approve an agreement that certain conditions must be satisfied before another condition takes effect.

It appears to us that Pace is using this issue as a pretext to get out of a bargain he knowingly and voluntarily entered into, one that he himself signed. In fact, after the Debtor read the settlement into the record,

the court questioned Pace on his understanding of the agreement to pay the back child support:

THE COURT: So it's just back child support that you are speaking of?

MRS. HURT: Yes.

MR. EAGLEBURGER: Yes.

THE COURT: And Mr. Pace, you, of course, have read and initialed that line. You understand that's your agreement?

MR. PACE: I fully intend to pay it.

(Transcript of Record, January 23, 1990 Hearing)

4. Lack of Consideration/Vagueness

Pace and the other appellants argue that the agreement lacks consideration and is void for vagueness. The agreement contains numerous mutual conditions, each of sufficient legal detriment to qualify as adequate consideration. The agreement to terminate the subject adversary proceeding and drop all claims alone is sufficient consideration to support the agreement.

As to vagueness, the agreement seemed to be sufficiently clear to all the parties when they signed it. When the agreement was read into the record in open court, none of the parties objected. Moreover, the transcripts of the January 23, 1990 hearing show that the court had questioned the parties and that they clearly understood the agreement's meaning. The bankruptcy court stated:

> THE COURT: Well, I will add my own consent.
>
> . . .
>
> It appears to me that this settlement has been carefully considered by the parties with the advice of attorneys who are fully informed, and therefore, I will make the order approving this settlement . . .

The agreement was sufficiently clear to delineate all material obligations and duties of the parties. They cannot now raise nonexistent ambiguities as a pretext to avoid obligations they voluntarily agreed to.

5. Recision

Pace further argues that the bankruptcy court had no power to issue any order or judgment approving and adopting the stipulated agreement because no agreement was in affect at that time. He bases this assertion upon the fact that he filed a unilateral "Notice of Recision, Revocation and Cancelation of Settlement Agreement" on February 6, 1990. The unilateral declaration of recision had no effect on the terms of the agreement. The court had a valid agreement before it. (The basis of Pace's "recision" was the alleged misrepresentations surrounding the 500 E. Broadway property treated in Section B, Subsection 1, supra.)

6. Perco's Interest in the Subject Property

The subject property is a one-half undivided interest in property known as 500 E. Broadway. The entire property was originally owned by Pace's parents. They deeded an

undivided one-half interest[3], referred to in the briefs as "Property Interest A," to Pace and the Debtor in 1962 while they were married. Pace alleged that this deed was in return for an agreement of sale which was never paid by him nor the Debtor. The parents subsequently conveyed the exact same property to Kachina Plywood. Kachina Plywood conveyed it to Derco, Derco later conveyed it to Perco. These conveyances involved a complicated series of pledges, assignments, transfers, deeds and notes, most of which went unrecorded on the respective entities' books and records.

The controversy ultimately came down to the issue of the Debtor's ownership interest in the property and whether Perco had a lien on that interest. The property had been awarded to the Debtor as her sole and separate property pursuant to a decree of dissolution

---

[3] The other one-half interest "Interest B" is now owned by Tona Corp. It is not relevant to this appeal.

in 1978. Perco's interest was supported only by the testimony of Pace, who tried to explain the series of transactions resulting in Perco's lien.

The bankruptcy court decided in favor of the Debtor stating that insufficient evidence of Perco's lien was shown. The court discounted Pace's testimony as completely lacking in credibility. This was based upon the fact that the substantial sums of money that Pace claimed were transferred were never reflected on the books of the various entities, and that the property transfers occurring well before the marriage dissolution were not recorded until just after the dissolution.

The bankruptcy court as trier of fact is entitled to deference for its factual findings. It is the province of the trier of fact to evaluate the credibility and determine the significance of the testimony before it. "Findings of fact, whether based on oral or

documentary evidence, shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility the witnesses." Rule 8013. The bankruptcy court as trier of fact can evaluate the credibility of any evidence and the relative weight it may attach to any testimony. These findings cannot be set aside on appeal unless found to be clearly erroneous. Matter of Torrez, 63 B.R. 751, 753 (9th Cir. BAP 1986) aff'd, 827 F.2d 1299 (9th Cir. 1987).

Examining the trial transcript and the record taken as a whole we find that the bankruptcy court was not clearly erroneous in its findings. The record shows ample support for the trial court's decision to give little weight Pace's testimony. The court's rationale was made clear. No reason exists to disturb these findings.

7. Error in Striking the Testimony of Milton Pace II

Perco in its brief argues that the bankruptcy court erred in striking the testimony of Milton Pace II, described in the court's minute entry as Milton Pace, Jr., Pace's son. The only matter to which Milton Pace II testified was a purported guarantee of debt to an Oregon bank. This guarantee was in no way related to the 500 E. Broadway property. The bankruptcy court struck the testimony and the related trial exhibit on the basis of relevancy, noting that it was "cluttering up" the record.

On appeal, Perco fails to show how this testimony relates to a material matter or how it substantially affects the rights of any party involved, much less that of Perco. At best, it was a peripheral excursion to show an inconsistency in the testimony of a witness. The bankruptcy court committed no error in excluding this testimony.

V. CONCLUSION

Nothing brought to the attention of this Panel warrants the setting aside of the stipulated agreement that was voluntarily entered into. The bankruptcy court did not err in denying the Appellants' motions to vacate the Order and Judgment approving the agreement. Further, the bankruptcy court was not clearly erroneous in finding against Perco.

We are in agreement with the appellees that this is a frivolous appeal. This Panel also concludes that it is appropriate to award sanctions against the appellants and their attorneys in the form of attorney fees and double costs pursuant to Federal Rule of Appellate Procedure 38. We remand to the bankruptcy court for a factual determination as to the amount of attorneys fees and costs. AFFIRMED.

OFFICE OF THE CLERK

United States Bankruptcy Appellate Panel

of the Ninth Circuit

NOTICE OF ENTRY OF JUDGMENT

A separate Judgment was entered in this case on June 1, 1992

Motions for Rehearing

A motion for rehearing may be filed within 10 days after entry of the judgment. (Bankruptcy Rule 8015).

The motion shall be submitted on 8 1/2 by 11 inch paper, shall not exceed 15 pages in length, and shall comply with rules governing service and signature. An original and three copies shall be filed.

A motion for rehearing may toll the time for filing a notice of appeal to the Court of Appeals. See Bankruptcy Rule 8015.

Bill of Costs

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the

Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken. Also see, Federal Rules of Appellate Procedure 39.

Issuance of the Mandate

The mandate, a certified copy of the judgment addressed to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 21 days after entry of the judgment unless otherwise ordered by the Panel. A timely motion for rehearing will stay issuance of the mandate until 7 days after disposition of the motion, unless otherwise ordered. See Bankruptcy Rule 8017 and Federal Rules of Appellate Procedure 41.

Appeal to Court of Appeals

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $100 filing fee. Checks may be made payable to the U.S. Court of Appeals For The Ninth Circuit. See Federal Rules of

Appellate Procedure 4 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

Certificate of Mailing

The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this stamp appears was mailed this date to all parties in interest as designated by the Appellant in the Notice of Appeal.

/s/ Cynthia G. Sehton 6/1/92
Deputy Clerk Date

Appendix C

Order of the Court of Appeals for the Ninth Circuit dated May 20, 1994 affirming the Bankruptcy Appellate Panel

NOT FOR PUBLICATION

Filed May 20, 1994
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re:	No. 92-16538
NORMA J. HURT, Debtor.	BAP No. 0970-2 : AZ 90-1142-RJME
MILTON G. PACE, et al., Appellants,	
vs.	ORDER[1]
NORMA J. HURT, Appellee.	

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Meyers, Jones, and Russell, Judges, Presiding

Argued and Submitted April 12, 1994
San Francisco, California

---

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: SKOPIL, NORRIS, and O'SCANNLAIN, Circuit Judges

Milton G. Pace's motion to allow filing of "Supplement to: Appellant's Reply Brief" is denied.

The judgement of the bankruptcy court is affirmed for the reason stated in the Bankruptcy Appellate Panel's Memorandum Decision. We reverse, however, the Bankruptcy Appellate Panel's sanctions against all Appellants for bringing a frivolous appeal except the sanction against Appellant Milton G. Pace. We affirm the sanction imposed on Appellant Pace.

Appendix D

Order of the Court of Appeals for the Ninth Circuit dated July 22, 1994 denying petition for rehearing and suggestion for rehearing en banc

NOT FOR PUBLICATION

Filed Jul 22 1994
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re:	No. 92-16538
NORMA J. HURT, Debtor.	BAP No. 0970-2 : AZ 90-1142-RJME
MILTON G. PACE, et al., Appellants,	
vs.	O R D E R
NORMA J. HURT, Appellee.	

Before: SKOPIL, NORRIS, and O'SCANNLAIN, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petitions for rehearing, filed June 9 and June 14, 1994. Judge O'Scannlain has voted to reject the

suggestions for rehearing en banc, and Judges Skopil and Norris have recommended the same.

The full court has been advised of the suggestions for en banc rehearing and no judge of the court has required a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are DENIED, and the suggestions for rehearing en banc are REJECTED.

Appendix E

Letters of Petitioners to their Trial Counsel dated February 8-9, 1990 informing counsel that no authority to settle had been given

R & L DEVELOPMENT CORP.
P.O. Box 10490
Eugene, Oregon 97440

February 9, 1990

John C. Hover, Esq.
7250 North 16th Street, Suite 306
Phoenix, AZ 85020

Re: Zeco, Canco, Nevada West Systems, Inc.

Dear Mr. Hover:

This is to advise you that as President of R & L Development Corp. which is a stockholder in the following Corporations:

Zeco, Inc.

Canco, Inc.

Nevada West Systems, Inc.

That Mr. Wulfers had not contacted or ask for permission to settle this case. I believe that it was probably just like last year that he was not prepared and just didn't want to try it on the basis of law. (See Attached letter of Kachina Plywood dated March 14, 1989)

As the creditors of the Hurt Bankruptcy, we were not a party to the Domestic Relations Case DR 66280, and therefor our lien and rights have never been litigated.

Please cancel and rescind this "So Called" settlement agreement and pursue our claims.

Sincerely,

/s/

G. Zumwalt, President

KACHINA PLYWOOD, INC.
1752 S.E. HAWTHORNE SUITE B
PORTLAND, OREGON 97214
(503) 726-7181

February 9, 1990

Mr. John Hover, Esq.
7250 North 16th Street Suite 306
Phoenix, Arizona 85020

Re: Settlement Agreement to be recinded

Dear Mr. Hover:

This is to certify to you that the stockholders and the Board of Directors of Kachina Plywood, Inc. and Robertson Wood Products Inc., both Oregon Corporations did not authorize Mr. William Wulfers to settle our claims in the Norma Hurt Bankruptcy Action.

Enclosed you will find copies of letters relating to the case.

Sincerely

KACHINA PLYWOOD, INC.
ROBERTSON WOOD PRODUCTS, INC.

/s/
M. Glenn Pace II, President

enclosures

L & L SALES CO.
1752 SE Hawthorne, #A
Portland, Oregon 97214

February 9, 1990

Mr. John Hover
7250 N. 16th Street, Suite 306
Phoenix, Arizona 85020

Dear Mr. Hover:

As President of L & L Sales Co., which is a stockholder in Canco, Inc. and Nevada West Systems, Inc., I am hereby giving you authorization to pursue our claims in the Norma Hurt/Pace Bankruptcy.

We have not given any attorneys permission to negotiate a settlement in this case. We have been very patient in trying to collect our funds in this case.

Please cancel and rescind any settlement agreement that was signed for by the attorney's in the case as it was done without authorization by us.

Sincerely,

/s/

L. Stewart, President
Note: See Attached Letters

NEVADA WEST SYSTEMS, INC.
421 East Carson, Suite A-2
Las Vegas, Nevada 89101

February 8, 1990

Mr. John Hover
7250 North 16th Street Suite 306
Phoenix, Arizona 85020

Dear John:

This is to advise you that Nevada West Systems, Inc. has not authorized any settlement in the Norma Hurt/Pace Bankruptcy Action Adversary Claims.

This is to advise you to represent our interests in the Norma Hurt Bankruptcy and to pursue our claims that we have pending in this action.

Please keep me informed as to the action that is taken.

Sincerely,

/s/

T. Hull,
Vice President

B. Spain
c/o P.O. Box 1330
Las Vegas, Nevada 89125

February 8, 1990

Mr. John Hover
7250 North 16th Street Suite 306
Phoenix, Arizona 85020

Dear John:

This is to inform you that I did not give anyone permission to settle my claim for $5,000.00, let alone jeopardize my possession of my interest in property held with the Pace's.

I do not intend to release any property held by any Corporations that I have a interest in and I did not authorize anyone to make a settlement in this action. In fact I was prepared to appear and testify on this case.

Sincerely,

/s/

B. Spain

[These letters were stamped pages 00435 through 00431]

Appendix F

Affidavit of T. Hull dated March 3, 1990

AFFIDAVIT OF T. HULL

STATE OF ARIZONA)
) ss.
County of Maricopa)

I. T. HULL, being first duly sworn upon my oath, depose and state as follows:

1. That Affiant is the authorized representative of SUNWAY SYSTEMS, INC., and is authorized to make this Affidavit.

2. That the undersigned was aware that Mr. Eagleburger had represented in open court on January 22, 1990, that the 1978 divorce Judgment in favor of NORMA PACE and Corbet and Eagleburger, had been validly renewed.

3. That in considering the concessions which SUNWAY was making in settling the case on the second day of trial, the undersigned was relying on the fact that a valid lien existed in favor of NORMA HURT in at least the amount of $19,000.00 (and possibly up to $40,000.00 if interest were also awarded) in agreeing to the settlement.

4. The undersigned was advised after the settlement was entered, that SUNWAY's

counsel had discovered that apparently no such judgment lien existed, because of failure to renew the Judgment in 1988.

5. That the undersigned is informed that counsel for SUNWAY undertook certain efforts to verify through Mr. Eagleburger's office, whether such a Renewal Affidavit was ever filed, and upon being advised that Mr. Eagleburger had not responded, Affiant instructed counsel to attempt to set aside the settlement and/or any Judgment that might be entered based on that settlement.

6. SUNWAY would never have agreed to the settlement and its adverse affect on SUNWAY's claims, had SUNWAY been aware that the Judgment was not validly renewed and the lien did not exist.

7. Further Affiant sayeth naught.

DATED this 3 day of March, 1990.

/s/
T. Hull

SUBSCRIBED AND SWORN to before me this 3 day of March, 1990, by T. HULL.

/s/
Notary Public

My Commission Expires:

5/4/92

[These pages were numbered 000447 - 000448]

Appendix G

Affidavit of William C. Wulfers, Jr.

dated June 18, 1990

WILLIAM C. WULFERS, JR., P.C.
Attorneys At Law
6902 East First Street
Scottsdale, Arizona 85251
(602) 946-5484
FAX (602) 947-9379

Attorneys for Defendants/Claimants
KACHINA, ROBERTSON, INTERMOUNTAIN

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re:	
	CASE NO. 85-3802-PHX-RGM
NORMA J. HURT,	
Debtor.	
	AFFIDAVIT OF WILLIAM C. WULFERS, JR. PRIOR COUNSEL FOR KACHINA ROBERTSON AND INTERMOUNTAIN WOOD PRODUCTS
NORMA J. HURT, fka NORMA J. PACE,	
Plaintiff,	
vs.	
KACHINA PLYWOOD, INC. et al.,	
Defendants/ Claimants.	

COMES NOW William C. Wulfers, Jr., being first duly sworn deposes and states as follows:

1. That during the pendency of the above referenced adversary proceedings which were consolidated I was the attorney for KACHINA PLYWOOD, INC., and ROBERTSON WOOD PRODUCTS, INC. and for INTERMOUNTAIN WOOD PRODUCTS, INC., until my withdrawal from representation of said entities on or about the 1st of May, 1990.

2. That at the time of the trial of these consolidated adversary proceedings I was in attendance at said trial before the honorable Cameron Wolf; and

3. That on the second day of the trial settlement negotiations were entered into between myself on behalf of my respective clients and William Piatt on behalf of his respective clients, and other parties, with Norma Hurt and her counsel G. Gregory Eagleburger.

4. That these negotiations were held in the Judges Court room with the Judge not being present during the negotiations; and

5. During those negotiations Mr. Eagleburger and specifically his client Norma J. Hurt formally known as Norma J. Pace were asked approximately how much was owed in taxes on the 500 East Broadway property; and

6. That during those negotiations Mrs. Pace specifically stated that there was no more than $15,000.00 owed in property taxes on the 500 East Broadway property; and

7. That during the settlement negotiations there was a total failure to disclose that Mrs. Hurt was in receipt of and/or had any information or knowledge in regards to an ordinance violation regarding the title to the 502 East Broadway property; and

8. The first time that I was ever aware that there was a notice of a Ordinance violation on said property is when I received a copy of same on June 5, 1990 from Milton Pace.

9. It is my understanding that on or about the first part of February, 1990 when a search was done on these properties and a notice of ordinance violation turned up.

10. I have now been informed, upon information and belief, that rather than approximately a maximum of $15,000.00 of taxes on this property that there currently exist taxes on the 500 East Broadway property of approximately $60,000.00.

11. Further, that during the settlement negotiations Mr. Eagleburger informed us that he had incurred attorneys fees in the dissolution proceedings which were still owed on his judgment and that there was additional attorney's fees for substantial legal services in these adversary proceedings; and

12. Mr. Eagleburger failed to disclose to either myself or to co-counsel that his judgment for attorney's fees against Mr. Pace entered in the Decree of Dissolution of Marriage was now extinguished and null and

void due to the fact that he had failed to properly and timely renew the judgment.

13. That it is my personal opinion that had this information been disclosed at the settlement conference this case might have been substantially different than what was entered of record in the court proceedings that occurred immediately after on the second day of trial and after extensive negotiations between the parties and their counsel.

FURTHER AFFIANT SAYETH NOT.

/s/
WILLIAM C. WULFERS, JR., P.C.

STATE OF ARIZONA)
) ss.
County of Maricopa)

SUBSCRIBED AND SWORN to before me by William C. Wulfers, Jr. this 18 day of June, 1990.

/s/
Notary Public

My Commission Expires:

2/22/92

[These pages were marked 00520 through 000523]

Appendix H

Objection to Order and Judgment or, Alternatively, Motion to Set aside Order and Judgment If Entered, filed March 7, 1990

John C. Hover, Esq./#1246
HOVER & SLOMSKI
7250 North 16th Street, #306
Phoenix, Arizona 85020
Telephone: (602) 371-8777

Attorneys for Movants

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re:	
	CASE NO. 85-3802-PHX-RGM
NORMA J. HURT,	
	Adversary No. 87-199
Debtor.	(Consolidated)
	OBJECTION TO ORDER AND
NORMA J. HURT, fka NORMA J. PACE,	JUDGMENT OR, ALTERNATIVELY, MOTION TO SET ASIDE ORDER AND JUDGMENT IF ENTERED
Plaintiff,	
vs.	
KACHINA PLYWOOD, INC. et al.,	
Defendants/ Claimants.	

OBJECTION AND/OR MOTION

On or about February 6, 1990, a form of "Order and Judgment" was lodged with this court by C. Gregory Eagleburger, Esq., on behalf of Norma J. Hurt, Debtor. Kachina

Plywood, Inc., Robertson Wood Products, Inc., Intermountain Wood Products, Canco, Inc., Nevada West Systems, Inc. and Andrew B. Spain ("Movants") are all parties to this action and are subject to adjudications set forth in the said Order and Judgment. The proposed Order and Judgment initiates from a settlement agreed to by William C. Wulfers, Jr. and William M. Piatt, IV on behalf of Movants other than Spain. It is presently not clear to counsel whether someone signed the settlement on behalf of Spain.

Movants, by their undersigned counsel, who is retained specially for purposes of this objection and motion, request that Order and Judgment not be entered, or if now entered that the Order and Judgment be vacated, for the following reasons:

1. Movants did not authorize Mr. Wulfers and Mr. Piatt to enter a settlement of their claims. Representatives of three of movants, Kachina, Robertson and one other,

were reportedly present when the stipulation was reached but contend that the stipulation's terms were not explained to them and that the Order and Judgment varies from the settlement, e.g., to cite one instance, Norma Hurt was to provide a warranty deed (not quit claim) to the Broadway property free and clear of tax encumbrances (there is apparently $60,000.00 approximate in unpaid taxes).

2. The Order and Judgment purports to affect interests in property vested in persons or entities not joined as parties to this proceeding.

3. The proposed Order and Judgment is vague and uncertain as to the rights of Movants.

4. Entry of Judgment is not appropriate as the stipulation provides for nothing more than a settlement agreement, executory in nature, and does not provide the basis for a final judgment.

5. The Movants have, in their opinion, meritorious issues to be heard and decided by the Court.

This objection and motion is filed pursuant to Bankruptcy Rule 9024, and Federal Rules of Civil Procedure, Rule 60(c).

DATED this 14th day of February, 1990.

HOVER & SLOMSKI

By/s/
John C. Hover
7250 N. 16th St. #306
Phoenix, AZ 85020
Special Counsel for Movants

MEMORANDUM OF POINTS AND AUTHORITIES

Counsel was contacted by Movants only days ago and requested to appear specially for them on an emergency basis. The situation is unusual as (a) Movants contend, among other things, that Messrs. Wulfers and Piatt were not authorized to enter into the subject settlement and (b) the order for settlement pursuant to the alleged settlement agreement is executory in nature and therefore incapable

of being a judgment as proposed by counsel for Hurt.

A very brief review of some of the pleadings related to this adversary proceeding causes counsel to believe that the following issues exist:

1. What property belongs to the estate pursuant to 11 U.S.C. §541?

2. What claims of the Movants are enforceable against the estate as either unsecured or secured claims?

3. What enforceable interests exist in the Movants against particular properties of the estate?

4. Must other parties be joined to adjudicate the interests of the estate in one or more properties?

5. Has Hurt concealed property or otherwise acted in a manner which is cause for appointment of a Trustee or Examiner?

The foregoing issues are appropriate for consideration in any bankruptcy proceeding

depending upon the facts. Counsel, being substantially unfamiliar with these proceedings, does not suggest that further issues do not exist. However, it does appear that there are at least fundamental issues to be adjudicated.

Counsel further recognizes that the Court is confronted with a settlement announced by some of the attorneys of record which, if not undone, will require the Court to make appropriate determinations with respect to the various terms of the announced settlement. For instance, can the Court, without consideration of other factors, now order that violation of the settlement will subject one to either civil or criminal contempt? Does contempt involve the right to jury trial? Does "deed" mean warranty or quit claim deed? Must the Court have reliable evidence concerning title before ordering that identified property be confirmed as property of one party or another? Can the Court order

payment of child support in an action which is exclusively with the state court and, if so, can the failure of Mr. Pace to make payment impact rights of the Movants? Does the Court have jurisdiction to enforce orders to pay child support and to impose contempt sanctions for non-payment? Can any one of the Movants be ordered to deliver American Savings Life Insurance Stock to Hurt if it has no possession of the same? Can the Court order that any "related or affiliated person or entity" shall release interests in property without that person or entity being before the Court; and the same questions exists as to assignees or successors to liens or claims of Movants? What happens if those unnamed persons or entities default? Can the Court quiet title to real and personal property in this adversary based upon the pleadings before the Court and without evidence of title having been presented?

Counsel has not researched the stated questions but raises them for consideration and for the record. The Order and Judgment differs substantially from the written settlement stipulation received by counsel. Counsel was not present at the hearing to know whether a settlement other than the written one was read into the record.

Counsel does not, at this point, suggest that he has analyzed each of the Movant's positions on the merits. Counsel has done what was possible for him to accomplish on very short notice. However, the Court's consideration of this motion is requested as (1) Movants would ordinarily be entitled to their day in court absent waiver of the right to hearing based upon adequate information and (2) in any event Movants should not be subject to an order which is vague, ambiguous and perhaps in some instances beyond the jurisdiction of the Court.

It is most respectfully requested that the Court set for hearing the matter of whether the settlement stipulation should be set aside and, if not, the appropriate form of order to be entered. Counsel will be better acquainted with the facts by the hearing date and, by that time, will have sorted out issues including whether there is a possible conflict of interest in counsel's ongoing representation of all Movants. As of now, counsel makes a special appearance on behalf of Movants to timely advise the court of Movants' positions generally and to preserve the record on behalf of Movants.

DATED this 14th day of February, 1990.

HOVER & SLOMSKI

By /s/
John C. Hover
7250 N. 16th St. #306
Phoenix, AZ 85020
Attorneys for Movants

COPY of the foregoing mailed this
14th day of February, 1990, to:

William C. Wulfers, Jr., Esq.
6902 E. First Street
Scottsdale, AZ 85251

C. Gregory Eagleburger, Esq.
EAGLEBURGER & KELLER
340 E. Palm Lane, #200
Phoenix, AZ 85004

Carmen R. Moehle, Esq.
BOSCO & DI MATTEO
3101 N. Central, #700
Phoenix, AZ 85012

J. Jeff Richardson, Esq.
4025 S. McClintock, #202
Tempe, AZ 85282

William M. Piatt, IV, Esq.
PIATT & LIVONI
2700 North Central #1150
Phoenix, AZ 85004

Milton G. Pace, Pro Per
P.O. Box 20786
Phoenix, AZ 85036

B. Spain, Pro Per
c/o P.O. Box 1330
Las Vegas, Nevada 89125

Eric M. Jackson, Esq.
JACKSON, WHITE & GARDNER
1839 S. Alma School, #354
Mesa, AZ 85210

By /s/_____

[Pages were stamped numbered 000436 through 000442]